No. 298.

Brief of Smith for P. E.

Roberts, Printer, B'ham.

SEP 20 1897
JAMES H. McKENNEY,
CLERK

Filed Sept. 20, 1897.

In the United States Supreme Court

No. 298—October Term, 1897.

GEORGE POUNDS, Plaintiff in Error,

vs.

THE UNITED STATES.

BRIEF OF J. A. W. SMITH, ATTORNEY FOR PLAINTIFF IN ERROR.

THE FACTS.

The indictment under which the defendant (plaintiff in error) was convicted contains fifteen counts. (Record, pp. 2-4.) He is charged with running an illicit distillery, and each count of the indictment, no doubt, intended to charge some offense growing out of, or connected with, such a distillery. The fact is not shown by the record in this case, but I do not deem it improper to state here, that the evidence showed that the distillery which the defendant was charged to have been connected with was an illicit one—a "wild cat" still, pure and simple.

The jury returned a verdict of guilty under the *sixth* count

of the indictment, and defendant was sentenced to six months' imprisonment and fined one hundred dollars.

That count reads as follows:

> The grand jurors aforesaid, upon their oaths aforesaid, do further present, that, at the time and place and within the jurisdiction aforesaid, the said George Pounds unlawfully did conceal and aid in the concealment of distilled spirits on which the tax had not been paid, which said spirits had been removed to a place other than the distillery warehouse provided by law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. (Record, p. 3.)

The charge was intended to cover a case arising under section 3296 of the Revised Statutes.

After verdict, the defendant moved the court, in arrest of judgment, upon the following grounds, to-wit:

"That the said sixth count of the indictment is too vague and uncertain to authorize a judgment and sentence against the defendant" (record, pp. 7-8), and upon the further grounds, added by amendment (record, p. 8): 1. "The said sixth count of the indictment fails to show that there was a warehouse provided by law to which the spirits alleged to have been concealed should have been removed." 2. "That the jury separated before the verdict of the jury was returned into court."

The overruling of this motion (record p. 9) is assigned as error, record p. 10. The bill of exceptions (pp. 9 and 10 of record) also shows the motion overruled and the exception.

BRIEF.

1. It seems clear that section 3296 of the Revised Statutes intended to provide a punishment for a distiller who had complied with the various provisions of chapter four of the Revised Statutes, and had provided a warehouse as required by section 3271, and then concealed or aided in the concealment of distilled spirits which had been removed, the tax not having been paid, to a place other than the distillery warehouse so provided. No warehouse is provided for the storage of *illicit* spirits to be kept until the tax is paid; in fact there is no tax due on such spirits. Section 3296 was intended to punish offenses growing out of misconduct in connection with *legally* distilled spirits. Section 3289 provides the penalty for concealing *illicit* spirits.

The indictment does not inform the defendant that a warehouse was provided in which the spirits he is alleged to have concealed should have been stored until the tax was paid. It does not allege that any tax was due. It is too uncertain to sustain the judgment.

Pettibone vs. United States, 148 U. S. 197.
United States vs. Hess, 124 U. S. 483.

An omission of matters of substance in an indictment is not aided or cured by verdict.

United States vs. Hess, 124 U. S. 483.

2. The judgment should have been arrested because the jury made their verdict, sealed it and handed it to the clerk on Saturday and it was not opened by him until Monday. (Record pp. 6 and 7.) From the orders of the court it is fair to presume that the jury separated before the verdict was read. It was not

within the power of the defendant or his counsel to waive his right to have the jury kept together until they returned their verdict.

Lewis vs. United States, 146 U. S. 370.

Separation is not allowed, in any case, after the jury retire to find their verdict, until it is found and delivered in open court.

12 Am. and Eng. Encyclopedia of Law, p. 375.

J. A. W. SMITH,

Attorney for Plaintiff in Error.